Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 98-204
Broadcast and Cable	)	
Equal Employment Opportunity	)	
Rules and Policies	)	
and	)	
Termination of the	)	MM Docket No. 96-16
EEO Streamlining Proceeding[1]	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 2000 **Released: November 22, 2000**

By the Commission: Chairman Kennard issuing a separate statement; Commissioner Furchtgott-Roth dissenting and issuing a statement.

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I. INTRODUCTION

1. The Commission has before it a Petition for Partial Reconsideration and Clarification of the *Report and Order in MM Docket Nos. 98-204 and 96-16*, 15 FCC Rcd 2329 (2000) ("*Report and Order*") filed by the National Association of Broadcasters ("NAB"); responses thereto filed by Minority Media and Telecommunications Council and 30 other organizations ("MMTC")[2] and by National Organization for Women Foundation and seven other organizations ("NOW");[3] NAB's Comments in response thereto; and a letter from counsel for MMTC dated May 8, 2000. In addition, we will address herein a Petition for Expedited Clarification of the FCC's New EEO Rule filed by the law firm of Fleischman and Walsh, L.L.P. ("Fleischman"). In the *Report and Order*, the Commission adopted new broadcast Equal Employment Opportunity ("EEO") regulations and policies and amended its cable EEO rules and policies. The rules are designed to be consistent with the D.C. Circuit's decision in *Lutheran Church – Missouri Synod v. FCC*.[4] NAB also requests clarification of certain aspects of our rule. We will deny NAB's petition insofar as it seeks reconsideration of the rules adopted by the *Report and Order*. However, we will provide clarification as to several of the issues raised by NAB, as well as the issue raised by Fleischman. In addition, we will consider certain issues pertaining to the *Report and Order* on our own motion, primarily as a result of informal inquiries from the public.

2. NAB's petition specifically concerns only the broadcast EEO Rule. Amendments to the EEO rules applicable to cable entities, including multichannel video programming distributors ("MVPDs"), were designed to conform those rules, as much as possible, to the broadcast EEO Rule.[5] Accordingly, although no cable entity or representative thereof has sought reconsideration of the cable EEO rules, clarifications provided herein will also apply to those rules insofar as they incorporate requirements similar to those in the broadcast EEO Rule.

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[2] In addition to MMTC, the organizations include: African American Media Incubator, Alliance for Community Media, Alliance for Public Technology, American Civil Liberties Union, Black College Communications Association, Civil Rights Forum on Communications Policy, Cultural Environment Movement, Fairness and Accuracy in Reporting, League of United Latin American Citizens, Mexican American Legal Defense and Education Fund, Minority Business Enterprise Legal Defense and Education Fund, National Asian American Telecommunications Association, National Asian Pacific American Legal Consortium, National Association of Black Owned Broadcasters, National Association of Black Telecommunications Professionals, National Association for the Advancement of Colored People, National Bar Association, National Council of La Raza, National Hispanic Federation for the Arts, National Hispanic Media Coalition (including its Los Angeles, New York, Chicago, Tucson, Albuquerque, Phoenix and San Antonio Chapters), National Latino Telecommunications Taskforce, National Urban League, People for the American Way, Project on Media Ownership, Puerto Rican Legal Defense and Education Fund, Rainbow/PUSH Coalition, Telecommunications Advocacy Project, Telecommunications Research and Action Center, and Women's Institute for Freedom of the Press.

[3] In addition to NOW, the organizations include: Center for Media Education, Feminist Majority Foundation, NOW Legal Defense and Education Fund, Philadelphia Lesbian and Gay Task Force, Wider Opportunities for Women, Women's Institute for Freedom of Press, and United Church of Christ.

[4] 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied*, 154 F.3d 487, *pet.for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*").

[5] *Report and Order*, para. 1, 15 FCC Rcd at 2330-31.

II. DISCUSSION

A. Recruitment

3. NAB objects to the requirement of the Rule that broadcasters recruit for every vacancy. NAB contends that, because of broadcaster compliance with EEO regulations for the past 30 years, minorities and women have made "great inroads" into the broadcasting industry. Accordingly, NAB argues, a requirement that broadcasters recruit for every vacancy is no longer necessary. Thus, even if broadcasters did rely upon "word-of-mouth" recruitment, NAB contends that would not operate to exclude women and minorities because they are now part of the "word-of-mouth" network. MMTC generally supports recruitment for all vacancies but indicates that exceptions could be made for job categories where the number of minorities and women industrywide approaches parity with the national labor force. MMTC suggests that, at that point, reliance can be placed on "word-of-mouth" networks that include minorities and women. It suggests that janitors and secretaries might be appropriate job classifications for exemption from the recruitment requirement. NOW supports the retention of the recruitment requirement in order to afford all qualified individuals the opportunity to gain employment within the broadcast industry.

4. The requirement that broadcasters recruit for every vacancy has long been part of our broadcast EEO Rule.[6] Accordingly, we are prohibited from modifying this requirement as applied to television licensees by virtue of Section 334(a) of the Communications Act of 1934, as amended ("Communications Act"), which states that the Commission shall not revise the EEO Rule applicable to television in effect on September 1, 1992.[7] Similarly, the statute establishing EEO requirements for cable entities requires recruitment whenever jobs are available.[8] NAB has failed to justify a departure from these requirements for radio licensees.

5. NAB's justification for the elimination of the recruitment requirement is that 30 years of EEO regulations have resulted in minorities and women achieving increased job opportunities in the broadcast industry. However, this is an attestation to the success of the requirement, not grounds for its abandonment. We cannot confidently conclude at this time that the gains made in achieving a more diverse workforce would be preserved if we abandoned the requirements that substantially contributed to the achievement. Moreover, as recently as 1992, Congress found as follows in adopting the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"):

> (1) *despite the existence of regulations governing equal employment opportunity,* females and minorities are not employed in significant numbers in positions of management authority in the *cable and broadcast television industries*;
>
> (2) increased numbers of females and minorities in positions of management authority in the *cable and broadcast television industries* advances the Nation's policy favoring diversity in the expression of views in the electronic media; and

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[6] *See* former Section 73.2080(c)(2) of the Commission's Rules.

[7] 47 U.S.C. § 334(a); *Report and Order*, para. 22, 15 FCC Rcd at 2337. Of course, we did modify some aspects of our prior Rule in order to reconcile them with the constitutional limitations set forth in the *Lutheran Church* decision. *See Report and Order*, 15 FCC Rcd at 2343 n.59. Elimination of the recruitment requirement could not be justified on that basis.

[8] 47 U.S.C. § 634(d)(2)(B).

(3) rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.[9]

NAB has not demonstrated that the remaining problems found by Congress in 1992 have since been resolved so as to justify eliminating a requirement that has helped open up employment in the broadcast industry to a broader spectrum of job candidates. Moreover, in the absence of the requirement to recruit for all full-time vacancies, many of the most desirable positions might be open to a limited number of potential applicants, possibly excluding significant segments of the community, such as minorities and women.

6. Further, we note that the recruitment requirement contained in our present Rule is not limited to recruitment designed to attract minority and women applicants. Rather, it is designed to ensure broad outreach to all potential applicants, including, but not limited to, minorities and women. This race and gender neutral approach will provide significant benefits to all persons interested in broadcast employment, not only minorities and women. We do not believe it would be appropriate to create exemptions based on the racial and gender composition of the labor force, as suggested by MMTC, because we wish to maintain a race and gender neutral approach that eliminates barriers to employment that are unrelated to job qualifications.

7. Finally, NAB submits as an attachment to its Petition a letter from a broadcaster who indicates that his station typically begins the recruitment process by talking to other broadcasters as the first step. He also reports that this is followed up by contacts with other public sources. The broadcaster complains that the *Report and Order* renders such "word of mouth" techniques as contacts with other broadcasters "unacceptable." This is incorrect. We have precluded reliance on "word of mouth" recruitment as the sole method of recruitment because "word of mouth" techniques alone will not achieve broad outreach. However, a broadcaster is not precluded from utilizing "word of mouth" recruitment sources so long as it has also used public recruitment sources sufficient to widely disseminate information concerning the vacancy, as required by our rules.

B. Supplemental Recruitment Measures Under Option A

8. Under Option A of our EEO Rule, broadcasters are required to undertake two supplemental recruitment measures in addition to wide dissemination of information concerning vacancies. One of these supplemental recruitment measures involves performing longer-term initiatives selected from a "menu" of alternatives, such as participation in or sponsorship of job fairs, participation in community events, internship programs, scholarships, and similar activities.[10] Broadcasters with five to ten full-time employees must perform two activities selected from the menu every two years, while larger broadcasters must perform four activities every two years. NAB contends that this requirement is burdensome and unnecessary. NAB notes that it had proposed a similar menu-like system in its Comments filed in this proceeding. However, NAB intended its proposal as a substitute for the requirement that broadcasters recruit for every vacancy. NAB contends that imposing this requirement as a supplement to recruitment for every vacancy "may be too burdensome for some stations to use." It further urges that, in any event, the number of menu options broadcasters are required to implement over a two-year period is unduly burdensome and should be reduced. It cites the fact that broadcasters must attend four job fairs in order to

[9] 1992 Cable Act, Section 22(a) (emphasis added). *See also* H.R. Rep. No. 628, 102d Cong., 2d Sess. 111-17 (1992).

[10] *See* Section 73.2080(c)(2).

receive credit for having performed one menu option.[11] MMTC opposes any changes in the Option A menu options. NOW also opposes the elimination or reduction of the menu options, suggesting that, if anything, the options should be more focused on women and minorities.

9. We are not persuaded to modify our requirements in this respect. NAB's contentions are premised on little more than generalized claims of burden that it has failed to support with any specific evidence. Option A is intended to supplement the requirement for vacancy-specific recruitment with longer term recruitment and training activities that will raise the community's awareness of employment opportunities and develop a talent pool that broadcasters and cable entities can draw from as specific vacancies occur. As a result, all segments of the community will not only have access to information concerning specific job vacancies but also will be encouraged to develop the knowledge and skills to pursue them. We believe that this will enhance the effectiveness of vacancy-specific recruitment efforts. NAB's assertion that our new requirements impose unreasonable burdens is particularly unpersuasive because we have removed recordkeeping burdens imposed by our former Rule that are no longer necessary as a result of the Option A supplemental recruitment measures. Broadcasters that elect Option A will not have to collect data concerning the gender, race, or ethnicity of applicants, interviewees, or hirees, which many broadcasters identified as the most burdensome requirements of our former Rule. Instead, we require them to collect race and gender neutral data as to the recruitment sources of interviewees and hirees so that they can monitor whether those sources are productive.

10. NAB has similarly failed to support its claim that the number of menu options that broadcasters must perform is unreasonable. The Rule provides a number of options from which a broadcaster may choose. For example, if it feels that attending four job fairs over a two-year period is excessive, it can choose among a wide array of other options. Moreover, the Rule incorporates relief for small broadcasters by requiring performance of fewer menu options by broadcasters with five to ten full-time employees. Finally, we will not modify the menu options as suggested by NOW to more narrowly focus on women and minorities. The menu options are part of a program that is designed to benefit all segments of the community, including, but not limited to, women and minorities. If recruitment activities are inclusive, the entire community should benefit.

11. As indicated in the *Report and Order*, we intend to provide broadcasters maximum flexibility and opportunity to experiment with respect to the implementation of the menu options.[12] Thus, our Rule specifically allows initiatives developed by broadcasters that are not otherwise enumerated in the Rule.[13] We have received inquiries as to whether it would be permissible to implement half of two options and combine the two halves to count as one of the four initiatives (or two in the case of stations with five to ten full-time employees) required over two years, such as, by combining attendance at two (rather than four) job fairs pursuant to Section 73.2080(c)(2)(i) and sponsorship of one (rather than two) community event pursuant to Section 73.2080(c)(2)(xi). This would be consistent with the intent of our Rule, which is designed to afford broadcasters flexibility in the implementation of the menu options. Thus, we wish to encourage broadcasters to experiment in order to find the outreach initiatives that will be most effective in their communities and make the best use of their resources.

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[11] *See* Section 73.2080(c)(2)(i).

[12] *Report and Order*, pare. 103, 15 FCC Rcd at 2374.

[13] *See* Section 73.2080(c)(2)(xiii).

C. Markets with Low Minority Labor Force

12. NAB urges us to reinstate what it refers to as the "traditional exemption" applicable under our former Rule in the case of broadcasters located in markets with a minority workforce of five percent or less. MMTC expresses concern that the reinstitution of the exemption could raise questions as to the program's compliance with *Lutheran Church*. NOW contends that the exemption is no longer necessary.

13. The policy in question was not a wholesale exemption from the Rule. Women are present in all markets and thus all broadcasters were required to maintain an EEO program directed to women, and hence were required to recruit for all vacancies. However, when a broadcaster applied for a new construction permit or approval of the assignment or transfer of control of an existing license, it was generally required to submit an EEO program showing how it would assure equal employment opportunity for both women and minority groups.[14] Similarly, at renewal time, broadcasters were required to set forth information and data concerning their EEO efforts specifically targeting both women and minorities.[15] Because the focus of the pertinent forms was on efforts to recruit minorities and women, we recognized that there was no purpose in requiring the information and data required by those forms with respect to minorities where minorities were not significantly present in the labor force.

14. Our present rule does not focus on efforts to recruit minorities and women specifically, but rather on efforts to achieve broad outreach to all segments of the community. Thus, the present Forms 396-A and 396 are not directed specifically to efforts to recruit women and minorities, but rather to efforts to achieve broad outreach. Because we do not request information or data targeted to efforts to recruit minorities, an exemption for broadcasters located in markets with a small minority workforce would not be pertinent, as indicated in the *Report and Order*.[16]

15. NAB contends that our emphasis on broad outreach to the entire community is inconsistent with our purpose, as perceived by NAB, of "increasing minority participation in the broadcasting industry." This is without merit. Our Rule is still designed to ensure equal opportunity for all applicants to learn of and compete for jobs, including minorities and women. We believe that the goal of equal opportunity we have always sought can be achieved through a policy based on broad outreach. Insofar as all prospective applicants are given a meaningful chance to seek broadcast employment, minorities and women will necessarily be included, while avoiding the perception that those groups are being unfairly favored to the disadvantage of other groups. Accordingly, NAB has failed to demonstrate a basis for reinstating the former practice and its request for reconsideration is therefore denied.

D. Internet Recruitment Efforts

16. NAB contends that the Rule does not give credit for the use of the internet as a recruitment tool, based on its interpretation of Paragraph 86 of the *Report and Order*.[17] NAB therefore requests reconsideration of our decision insofar as it excludes the internet completely and urges that we

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[14] *See* former Form 396-A, set forth as Appendix C of *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) ("*1987 Report and Order*") at 3978 *et seq.*

[15] *See* former Form 396, set forth as Appendix E of the *1987 Report and Order*, 2 FCC Rcd at 3991 *et seq.*

[16] Para. 131, 15 FCC Rcd at 2383.

[17] 15 FCC Rcd at 2368-69.

should recognize it as a valid method (among many different methods) of widely disseminating job vacancy information. MMTC contends that the internet is not at present an effective method of reaching minorities. NOW argues that the Commission did not deny all credit for internet recruitment, but that the internet is not yet adequate as the sole means of recruitment.

17. We find no need for the requested reconsideration. Paragraph 86 of the *Report and Order* addressed the suggestion that we should adopt a rule that would find a broadcaster to have achieved broad outreach based on the use of the internet as its **only** recruitment source. We found that **at this time** reliance on the internet as the **sole** method of recruitment was not warranted. We nonetheless recognized that the internet may be a valuable recruitment source, albeit at this time "as one of several recruiting mechanisms." Thus, the *Report and Order* did not exclude the internet as a recruitment source, but recognized it as one of several useful methods a broadcaster might utilize in conjunction with others to achieve broad outreach.

18. We remain optimistic that the internet will develop as an increasingly effective means of communicating job vacancies to prospective applicants. As indicated in Paragraph 87 of the *Report and Order*[18], we will continue to monitor the development of internet job banks. Also, we will entertain requests to modify our current position that the internet is not yet adequate, by itself, to widely disseminate vacancy information, in accordance with the standards specified in Paragraph 87 of the *Report and Order*.

E. Enforcement Procedures

19. NAB generally objects to our enforcement procedures and "zero tolerance" policy, including our recordkeeping and reporting requirements, as unnecessary in light of the absence of any evidence that broadcasters are unlikely to comply with our requirements. NAB contends that broadcasters have complied diligently with EEO requirements in effect during the past 30 years and gains have been made within the industry. MMTC questions the industry's commitment to EEO efforts in the absence of a rule. It also urges that, even to the extent that most broadcasters comply, there should be no acceptable level of noncompliance. NOW supports the specific enforcement measures we have adopted.

20. The enforcement mechanisms we have adopted are designed to ensure compliance and to assist the broadcasters in implementing the program. NAB has failed to demonstrate these measures are unduly burdensome. We note in this regard that we have eliminated many of the aspects of the prior rule to which broadcasters most objected, in particular, the requirement to track the gender, race and ethnicity of all applicants, interviewees and hires. Also, we have sought to accord broadcasters maximum discretion in designing their EEO programs. Moreover, NAB misperceives the "zero tolerance policy." It provides notice that the Commission will not fail to act when habitual or egregious violations of program requirements are demonstrated. The policy will not be implemented to impose sanctions on broadcasters for minor deficiencies where the overall record demonstrates a good faith effort to comply with the program's requirements. Especially in the initial implementation of our new requirements, we expect to rely upon guidance and advice more than sanctions to achieve our underlying goal of ensuring the implementation of effective EEO programs.

[18] 15 FCC Rcd at 2369.

F. Recordkeeping Requirements

21. NAB contends that the recordkeeping requirements contained in the Rule are unduly burdensome and unnecessary. It contends that the requirement under Option B to collect data on the race and gender of applicants remains burdensome because it is often necessary to request applicants to provide this information. It further asserts that the recordkeeping requirements of the Rule are inconsistent with the goal of reducing recordkeeping requirements for some broadcasters reflected in *Streamlining Broadcast EEO Rules and Policies*, 11 FCC Rcd 5154 (1996) ("*Streamlining*"). It urges that the imposition of what it views as more stringent recordkeeping requirements is inconsistent with the approach proposed in *Streamlining*.

22. We believe that the recordkeeping requirements applicable to Option A and B, respectively, are reasonably necessary to enable broadcasters, the public, and the Commission to monitor compliance with the requirements of the recruitment option elected by the broadcaster. The records required to be maintained permit verification that a broadcaster took the steps it was required to take under the recruitment option it elected. In addition, the Rule requires specified data designed to permit verification that the broadcaster's efforts under the recruitment option it elects are succeeding in widely disseminating information concerning job vacancies. Without such data, the broadcaster may not be able to assess whether its outreach is inclusive, and the Commission will have no way to verify that the broadcaster has complied with the requirements of the recruitment option it elected.[19]

23. NAB's claim that the recordkeeping requirements are unduly burdensome is not supported. The only specific burden cited is the burden of tracking the race/ethnicity and gender of applicants. We note that any broadcaster that finds that requirement unduly burdensome can avoid it by electing recruitment Option A; broadcasters that elect Option A are not required to track the race/ethnicity and gender of applicants. While that requirement is still applicable to broadcasters that elect Option B, the burden is no greater than under our former rule. Moreover, under either option, broadcasters are not required to track the race/ethnicity and gender of interviewees and hirees, as was the case under the former rule.

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[19] In his dissenting statement, Commissioner Furchtgott-Roth asserts that the "Commission's conclusion that race and gender data are not just relevant but 'necessary' to its review for compliance with the outreach duty also suggests that the data collection requirement is not severable from the rest of the EEO program." *See* Dissenting Statement of Commissioner Furchtgott-Roth, at note 4. He goes on to argue that "[i]t appears doubtful that the Commission would have adopted the substantive requirements of the outreach rule if it lacked the concomitant ability to evaluate and enforce compliance with those requirements." *Id.* Obviously, the invalidation of the data collection requirement imposed under recruitment Option B to which the dissenting Commissioner refers would only impair enforcement of recruitment Option B, and would have no effect whatsoever on enforcement of compliance with recruitment Option A or on any other aspect of the new EEO Rule. To avoid any possible misinterpretation of the Commission's intent in adopting the severability clause set forth in paragraph 232 of the *Report and Order*, we clarify here our intent as to severability: (1) if any of the data collection requirements imposed under Option B were invalidated, it is our intent that only Option B would be invalidated because only that option would be impaired; (2) if the "menu items" set forth in Sections 73.2080(c)(2)(iii) or (c)(2)(xii) (or the parallel provisions of the cable EEO rule) were invalidated, it is our intent that only those menu items would be invalidated and broadcasters and cable entities could then elect to participate in any of the remaining menu items set forth in Section 73.2080(c)(2) (or the parallel cable rule); and (3) if the Rule were invalidated as to any persons or circumstances, then its provisions would be invalidated only as applied to those persons or circumstances and would otherwise remain in effect. *See Report and Order*, para. 232, 15 FCC Rcd at 2420.

24. We sought to determine in the *Streamlining* proceeding whether relief was warranted for certain smaller broadcast stations or stations in smaller markets arising from concerns expressed that such broadcasters had difficulties "attracting and retaining minority employees."[20] We proposed various alternatives to address this problem in the context of the requirements then in effect. However, the problem of demonstrating success in attracting and retaining minority employees is moot because our new Rule requires inclusive outreach to all job candidates, regardless of race or ethnicity. In addition, we have provided relief for smaller stations by requiring fewer menu options for stations with ten or fewer full-time employees that elect Option A and by excusing radio stations with ten or fewer full-time employees from mid-term reviews.[21] Finally, our Rule accords broadcasters a choice between two recruitment options (A and B) that will enable broadcasters to assess, in light of their own circumstances, which option involves the least burden. Many small broadcasters may find Option B to be less burdensome because they have relatively few vacancies. Accordingly, we believe that our current requirements are consistent with the thrust of our proposals in *Streamlining*, to the extent that those proposals have not become moot under the new EEO Rule.

25. Another proposal in *Streamlining* concerned the use of joint recruitment efforts.[22] While broadcasters remain ultimately responsible under the new Rule for ensuring broad outreach, they may engage in joint recruitment efforts, including, where appropriate, joint efforts to implement the Option A supplemental recruitment measures.[23] In this respect, the *Report and Order* is consistent with the *Streamlining* proposal.

26. Finally, we proposed addressing in *Streamlining* the use of alternative labor forces different from those generally required under our former EEO Rule.[24] Under our present EEO Rule, that issue is moot because, as discussed below, broadcasters may use reasonable, good faith discretion to define their markets and assess whether their outreach efforts within their markets are inclusive.

G. Reporting Requirements

27. NAB objects to two reporting requirements incorporated into the EEO Rule. It first objects to the requirement that broadcasters place certain information concerning their recruitment efforts in the station public file annually.[25] It also objects to the requirement that broadcasters file a statement of compliance with the Commission every two years.[26] NAB objects to both requirements because they constitute new reporting requirements that NAB views as unnecessary and redundant. It urges that these requirements are not warranted by past failures of broadcasters to comply with EEO requirements. MMTC urges the retention of both requirements. It contends that the public file

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[20] *Streamlining*, para. 20, 11 FCC Rcd at 5164.

[21] *See* Section 73.2080(c)(2) and (f) of the Commission's Rules.

[22] *Streamlining*, para. 31 *et seq.*, 11 FCC Rcd at 5168-70.

[23] *Report and Order*, para. 88, 15 FCC Rcd at 2369; para. 97, 15 FCC Rcd at 2371; and para. 103, 15 FCC Rcd at 2374.

[24] *Streamlining*, para. 35, 11 FCC Rcd at 5170-71.

[25] *See* Section 73.2080(c)(6) and (d)(2). The Rule also requires that a broadcaster place its public file report on its web site, if it has one. NAB also objects to this requirement, which we will address separately below.

[26] *See* Section 73.2080(i)(1).

requirement is essential to ensure the widest possible availability of EEO compliance information. MMTC contends that, in addition to its use for members of the public in a station's community, the information is also legitimately used by national civil rights organizations that assist local groups in monitoring EEO compliance and to prospective employees who are concerned about their prospective employer's EEO record.

28. We are not persuaded by NAB's contentions that the public file report and the biannual statement of compliance are unnecessary. We have accorded broadcasters considerable discretion in the implementation of their EEO programs. We believe that the monitoring devices we have established are necessary and reasonable to ensure that EEO programs are meaningfully implemented on a continuing basis. We do not believe that this goal could be reliably ensured by conducting a review of EEO compliance only at the end of eight-year license terms. Thus, we seek to ensure that licensees do not ignore our EEO requirements until shortly prior to renewal time. Accordingly, we are requiring that broadcasters submit a statement of compliance (FCC Form 397) wherein a broadcaster must certify whether or not it has complied with the outreach requirements of the EEO Rule during the preceding two years. The requirement should not generally involve a significant burden because a broadcaster should be continuously aware of whether or not it is in compliance with Commission rules. However, if this is not so in a particular case, the required filing will enable the broadcaster to discover and correct any deficiencies in its EEO efforts long before the filing of its next renewal application. Further, we note that broadcast licenses have been the subject of frequent sales and consolidations in recent years. As a result, the licensee during the early part of a license term may have disposed of the license by renewal time. More frequent review of EEO efforts is warranted to ensure that each licensee, not just the licensee that holds a license at renewal time, will implement a meaningful EEO program.

29. We believe it particularly appropriate for the Commission to review broadcasters' EEO efforts more frequently than once every eight years in the initial stages of the implementation of our Rule. Thus, we expect to rely upon the statements of compliance, including, when applicable, mid-term reviews, to detect any problems in the administration of the Rule and to clarify issues that may arise concerning the Rule. This would be impossible if we awaited the next renewal application filings, which will not be due, at the earliest, until 2003.[27] We also believe that the statement of compliance will serve a beneficial purpose by ensuring that broadcasters periodically review the extent of their compliance.

30. Moreover, the public file report is designed to facilitate public participation in the EEO process. Because our goal is to ensure that broad outreach is achieved, we believe public participation is important. Thus, the public can bring to a broadcaster's attention a problem of which it might not otherwise be aware. In addition, we believe that meaningful, ongoing communication between a broadcaster and the public will result in a more effective outreach program.

31. Our record-keeping and reporting requirements are not based on any expectation that broadcasters are likely to violate the Rule. Rather, we anticipate that most broadcasters will seek to comply. We believe that the public file report and the statement of compliance will assist broadcasters in doing so by enabling them to detect and correct any problems expeditiously. As a result, initially minor deficiencies will not develop into a long-standing pattern of perhaps unintentional noncompliance that may result in delay and a serious enforcement action at renewal time. In addition, as noted above, broadcasters may benefit from communication with, and input from, the public. Accordingly, we believe that the public file report and the statement of compliance are necessary for the proper administration of our Rule, and we do not believe that they impose any unreasonable burden on broadcasters.

[27] *See* Section 73.1020 of the Commission's Rules.

32. NAB objects to the requirement that broadcasters who have web sites place the public file report on the web site. It compares the requirement to a proposal we previously rejected that a broadcaster be required to mail copies of documents contained in the public file to persons outside the station's service area.[28] NAB further notes that some stations maintain web sites that are not configured for purposes such as the posting of the public file report. Accordingly, a substantial expense would be involved in posting the public file report. NAB also asserts that requiring the internet posting of the public file is inconsistent, in NAB's view, with our unwillingness to credit the internet as a recruitment tool. Both MMTC and NOW oppose NAB's request that we delete this requirement. They contend that there are legitimate uses for the information outside of the service area. MMTC also points out that, even if the licensee's web site could not accommodate the public file report, the licensee could arrange for its inclusion on some other party's web site with an appropriate link.

33. We will retain the requirement that broadcasters that have a web site post the public file report on it. The requirement is designed to facilitate access by persons within the service area. That this may also make it accessible to persons outside the service area is therefore not material and we need not reach the question of whether such persons have a legitimate need for the information. With respect to the contention that, in some instances, broadcasters may experience difficulties in accommodating the public file on their existing web sites, NAB has failed to provide information as to the extent of any such difficulties or the costs involved in addressing them sufficient to justify a change in the requirement specified in our rules.

34. NAB requests clarification as to whether the public file report must include the names of interviewees. The pertinent provisions of the Rule state that the public file report should include the number of interviewees or applicants, as applicable.[29] Thus, we confirm that there is no requirement that the public file report include the names of the interviewees or applicants. All that is required is, under Option A, the total number of interviewees generated by each recruitment source during the year preceding the filing of the report (e.g., Daily Newspaper – 11 interviewees) or, under Option B, the total number of applicants generated by each recruitment source during the year preceding the filing of the report as well as a breakdown of how many of those applicants were women or members of a minority group (e.g., Daily Newspaper – 50 applicants including 25 women, 18 Blacks, 8 Hispanics, 4 Asian/Pacific Islanders).

H. Annual Employment Report (FCC Form 395-B)

35. NAB requests modification or elimination of the Broadcast Annual Employment Report (FCC Form 395-B). Form 395-B is an annual report of the employees at a broadcast employment unit, broken down by gender and race/ethnicity. This information will be utilized to monitor industry trends, assess the effectiveness of our Rule, and report to Congress.[30] We continue to believe that these are important functions, and, accordingly, decline to eliminate the filing requirement. We made it clear in the *Report and Order* that the information will not be used in any way to assess broadcasters' or cable entities' compliance with our EEO rules. Further, we will summarily dismiss any petition filed by a third party based on Form 395-B employment data.[31] This means that we will not use employment data as a means for

[28] *Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, 14 FCC Rcd 11113, 11119-20 (1999).

[29] *See* Section 73.2080(c)(6)(iv) and (d)(2).

[30] *Report and Order*, para. 164, 15 FCC Rcd at 2395.

[31] *Report and Order*, para. 225-26, 15 FCC Rcd at 2417-18.

processing or screening renewal applications or mid-term reviews. It also means that we will not use this data as a basis for conducting audits or inquiries.

36. NAB contends in its Petition that, notwithstanding our express intent not to consider employment data in assessing broadcasters' and cable entities' EEO compliance, its collection might nonetheless violate *Lutheran Church* by creating pressure to engage in race-based hiring because overall industry trends might ultimately impact decisions concerning possible changes in applicable EEO regulations. MMTC argues in opposition that it is unlikely that hiring decisions would be impacted by this consideration. NOW contends that the Commission, Congress and the public need the information collected in order to assess the effectiveness of the rules.

37. We disagree with NAB's contention that the collection of employment data might result in raced-based hiring decisions. We do not believe that a broadcaster would take into account an applicant's race in connection with a particular hire because of its speculative and highly attenuated impact on future regulations affecting the industry generally. Thus, in making a particular hire, the primary concern of any reasonable broadcaster is to find the best possible person for the job at hand. It is highly unlikely that a broadcaster would hire a less qualified person solely for the purpose of impacting overall industry employment statistics because the impact of an individual hiring decision on those statistics would be negligible and Commission action modifying the EEO Rule as a result of long-term industry trends would be highly speculative.

38. NAB urges that, if we retain the employment report requirement, we should at least adopt a procedure whereby the employment data supplied would be separated from the identity of the broadcaster supplying it. NAB justifies its request on the ground that it will "ameliorate broadcasters' concerns" and prevent misuse of the data either by the Commission or other parties. MMTC and NOW oppose NAB's proposal, arguing that the public is entitled to access to this information.

39. We will not adopt the NAB's proposal. We have made it clear that we will not use this data for the purpose of assessing any aspect of an individual station's compliance with our EEO rule, and that we will summarily dismiss pleadings alleging EEO violations based on that data. Therefore, we do not believe that there is a legitimate basis for broadcasters to fear that the data will be used against them in EEO enforcement proceedings. While we have considered the proposal to use a "tear-off" sheet to separate the identity of the filer from the employment data, we have declined to adopt it for several reasons. To ensure the integrity of our data collection program, we need to maintain the identity of the filer with the data at least long enough to allow the staff to contact the filer if the data submitted is incomplete. If we separated the identity of the filer from its filing immediately, we would have no way to contact the filer in the event that we discovered, upon review, that its submission was incomplete. Nor is separation of the filer's identity *after* an initial review to determine completeness a workable solution. Under the Freedom of Information Act,[32] we would not be able to withhold the complete filing from members of the public during our initial review period, however brief that might be, so this procedure would not accomplish the NAB's goal of making the filing completely anonymous. In any event, we believe that we are legally precluded from adopting the NAB's tear-off sheet proposal. Under the Federal Records Act (FRA),[33] we cannot "alienate or destroy" any information that is an integral part of an agency record except in compliance with the FRA's provisions. We believe that the identity of the filer would be considered an integral part of the employment report that could not be severed from the

[32] 5 U.S.C. § 552.

[33] 44 U.S.C. §§ 2101 et seq., 2901 et seq., 3101 et seq., 3301 et seq.

employment statistics under the FRA.[34] Thus, the only way to assure the complete anonymity that the NAB seeks would be to allow the employment report to be filed anonymously. But this would afford us no way of enforcing the reporting requirement, and thus would completely undermine the integrity of the data collection program.

40. Nevertheless, in order to alleviate the concerns of broadcasters to the fullest extent possible consistent with our statutory responsibilities and constraints, we will add a provision to the broadcast and cable EEO rules reflecting the assurances we have repeatedly provided: that data concerning the gender, race and ethnicity of a broadcaster's or cable entity's workforce will be used only for purposes of analyzing industry trends and reporting to Congress, and that it will not be used for the purpose of assessing any aspect of an individual broadcaster's or cable entity's compliance with our EEO rules. Since we are legally obligated to comply with our own rules,[35] this should put to rest the concerns of even the wariest broadcaster.

41. NAB finally urges that we should require the filing of employment data every two years rather than every year. It cites the fact that a licensee is only required to file an ownership report (FCC Form 323), which includes information as to gender and race or ethnic status of owners, every two years.[36] MMTC and NOW urge the retention of the annual filing.

42. We will continue to require the annual filing of the employment report. The ownership report is not analogous to the employment report because, in addition to the routine biennial filing of the ownership report, broadcasters must file an ownership report within 30 days after consummating an ownership change that requires Commission approval,[37] a requirement inapplicable to the FCC Form 395-B. Thus, the information available to the Commission at any given time remains reasonably current. We believe that, especially in view of the large number of station sales that have taken place in recent years, an annual filing of the employment report is necessary to ensure reasonably current data. Indeed, Section 334 and Section 634 of the Communications Act, which require the collection of annual employment data concerning broadcast television licensees and cable entities,[38] reflect a Congressional preference for annual filings of employment data. Moreover, the filing of this data is not unduly burdensome. Finally, for the same reasons discussed in para. 4, above, we believe that Sections 334 and 634 of the Communications Act would preclude a change in this requirement for broadcast television stations and cable entities. To adopt a different requirement for radio would render the data for these services less useful because the data would reflect different time periods.

I. Sunset

[34] *See Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993). The D.C. Circuit held in *Armstrong* that an agency violated the FRA by preserving only paper records of the text of e-mail messages which did not show who sent the document, who received it, and when it was received. The court viewed the missing information as integral parts of the agency record that the agency lacked discretion to "lop off." 1 F.3d at 1286.

[35] *See, e.g., Service v. Dulles*, 354 U.S. 363, 388-89 (1957); *Gardner v. FCC*, 530 F.2d 1086, 1089-91 (D.C. Cir. 1976).

[36] *See* Section 73.3615(a) of the Commission's Rules; *1998 Biennial Regulatory Review – Streamlining Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056, 23094 (1998).

[37] *See* Section 73.3615(c) of the Commission's Rules.

[38] *See* Sections 334 and 634(d)(3)(A) of the Communications Act, 47 U.S.C. § 334 and 554(d)(3)(A).

43. NAB urges that we should establish a sunset provision establishing a date when EEO enforcement will be discontinued because there is an absence of evidence that discriminatory practices continue to exist. MMTC indicates that it may in the future be appropriate to establish a sunset provision for some aspects of the rules based on industry trends as to the employment of minorities and women.

44. For the reasons stated in paragraph 148 of the *Report and Order*,[39] we do not believe that the establishment of a sunset deadline is appropriate at this time. In particular, as noted therein, we do not believe that such a deadline would be consistent with Sections 334 and 634 of the Communications Act, which require us to maintain EEO rules for television broadcasters and cable entities. NAB does not address these statutory constraints. We also note that the requirements we have adopted are race neutral. Thus, they are based on the proposition that broad outreach will ensure equal opportunity for all, and the absence of evidence that "discriminatory practices continue to exist" would not necessarily indicate that the rules no longer serve the public interest.[40] Finally, NAB does not even suggest an objective basis on which to sunset the rules.[41] Of course, as with all our rules, we will monitor the continuing effectiveness of and need for the EEO requirements on an on-going basis.

J. Filing Date for Initial Statement of Compliance (Form 397)

45. NAB requests clarification of the filing schedule for the initial statement of compliance (Form 397). It notes that the rule requires that a statement of compliance be filed on the second, fourth and sixth anniversaries of the filing of a station's last renewal application.[42] However, paragraph 143 of the *Report and Order* indicates that the first filing will be made on June 1, 2000, only by the television renewal group consisting of stations in the District of Columbia, Maryland, Virginia and West Virginia, and that the first filing by radio licensees will be made on June 1, 2001, by radio stations in the same states.[43] NAB contends that this is inequitable, confusing and contrary to the rule.

46. We will clarify our policy regarding the initial filing of statements of compliance. In doing so, we will abandon the schedule suggested in paragraph 143 of the *Report and Order*. Initially, by *Public Notice* dated April 28, 2000, we indicated that, for the year 2000, we expect statements of compliance from only four television renewal groups: District of Columbia, Maryland, Virginia and West Virginia (June 1, 2000); North Carolina and South Carolina (August 1, 2000); Florida, Puerto Rico and the Virgin Islands (October 1, 2000); and Alabama and Georgia (December 1, 2000). We will adhere to that schedule for the year 2000. However, beginning in 2001, we will commence the regular filing schedule as prescribed in the rule, i.e., all radio and television stations will file a statement of compliance on the second, fourth, or sixth anniversary of the filing of their last renewal application. For instance, by February 1, 2001, statements of compliance should be filed by television stations in Arkansas, Louisiana, and Mississippi (fourth anniversary); television stations in New Jersey and New York (second anniversary); and radio stations in Kansas, Nebraska, and Oklahoma (fourth anniversary). For convenience, Appendix A hereto

[39] *Report and Order*, 15 FCC Rcd at 2389.

[40] NAB Petition at 16 n.5.

[41] *See id.*

[42] *See* Section 73.2080(i)(1).

[43] *Report and Order*, 15 FCC Rcd at 2387.

sets forth the deadlines for the initial filing of the statement of compliance for each renewal group.[44] Thereafter, stations in each group must file the form biennially.

47. Low power television (LPTV) stations are subject to the broadcast EEO Rule by virtue of a cross-reference contained in Section 74.780 of the Commission's Rules. This includes the requirement to file statements of compliance. However, we will not require LPTV stations to file statements of compliance in 2000. Beginning February 1, 2001, LPTV stations with five or more full-time employees should begin filing statements of compliance in accordance with the schedule prescribed for television stations. We note, however, that LPTV stations are not subject to the requirement that certain EEO information be placed in the public file annually because LPTV stations are not required to maintain a public file. They are also not subject to mid-term review because such review is based on the public file report. Similarly, they are not required to submit a copy of the public file report at renewal time. However, LPTV stations with five or more full-time employees are subject to the recordkeeping requirements of Section 73.2080(c)(5) or (d)(1) of the Rules (depending on whether they have elected Option A or Option B), which must be submitted to the Commission if requested.[45]

48. We have also created a new broadcast service, Class A Television, consisting of former LPTV stations.[46] As in the case of LPTV, we will not require the filing of statements of compliance in 2000. Beginning February 1, 2001, Class A Television stations with five or more full-time employees should begin filing statements of compliance in accordance with the schedule prescribed for television stations. Unlike LPTV stations, Class A Television stations are treated as full power stations and are subject to most requirements applicable to full power stations.[47] This includes the requirements of the EEO Rule. Therefore, Class A television stations with five or more full-time employees will be expected to comply with the provisions of the EEO Rule, to place annually a public file report in the public file, to file a statement of compliance (FCC Form 397) every two years, and to submit a copy of the public file report as part of their mid-term statement of compliance, as well as at renewal time.

K. "Safe Harbor"

49. NAB requests that we should clarify our rule to specify the extent of recruitment that is required so as to create a "safe harbor" that will be presumed to constitute broad outreach. NAB contends that compliance with the outreach requirement requires that a broadcaster "prove" not only that its sources are sufficient to notify minorities and women of job vacancies but that minorities and women were in fact reached with this information. It contends that, in the absence of a prescribed "safe harbor," the only way to do so is to demonstrate that minorities and women are in fact present in interview pools (under Option A) or applicant pools (under Option B). Pursuant to its understanding of the Rule, NAB suggests that, under Option A, a broadcaster that gets most of its interviewees from the daily newspaper would be deemed to have an ineffective outreach proposal, even though the newspaper's circulation may reach the entire

[44] If the specified deadline is a holiday (including weekends), the statement is due the next business day. *See* Section 1.4(j) of the Commission's Rules.

[45] International broadcast stations are also not required to maintain a public file and therefore need not maintain an EEO public file report, but should otherwise comply with the recordkeeping and reporting requirements.

[46] *Establishment of a Class A Television Service*, 15 FCC Rcd 6355 (2000).

[47] *Id.*, para. 23, 15 FCC Rcd at 6365.

community. MMTC opposes the creation of a "safe harbor" because it would be misinterpreted as a quota and would discourage experimentation. NOW argues that Option A in itself constitutes a "safe harbor."

50. We will not prescribe a minimum number or type of recruitment sources that will be deemed to constitute broad outreach. The sources necessary to accomplish broad outreach will necessarily vary based on the circumstances of each community. Further, NAB's request is premised on the misconception that we will expect broadcasters to prove not only that they have achieved outreach to minorities and women but also that minorities and women in fact received the information and applied for jobs. The EEO Rule requires only that broadcasters engage in recruitment reasonably calculated to reach all segments of the community, including minorities and women. It does not require that minorities and women in fact be present in either applicant or interview pools to any specified degree. Indeed, under Option A, we have no way of determining the presence of minorities and women in the applicant or interview pools. Under Option B, a virtual absence of minority or women applicants despite their presence in the community might raise a question as to whether the broadcaster's recruitment sources were sufficient to reach them, and should cause a broadcaster to examine the reach of the recruitment sources it is utilizing. However, if the broadcaster were able to demonstrate that its sources in fact could be expected to reach those groups, a violation would not be found based on the fact that minorities or women did not apply. Under either option, a general lack of referrals from outside recruitment sources might similarly raise a question as to whether those sources were achieving broad outreach. With respect to NAB's hypothetical, we would not find recruitment ineffective simply based on the fact that a broadcaster's interviewees came from a daily newspaper that reached the entire community, nor would we draw any adverse inference from that fact.[48]

L. Impact of Rule on State Law

51. NAB requests a ruling that the Option B requirement of collecting data concerning the race, ethnicity, and gender of applicants preempts state laws that may restrict the collection of such data. NAB asserts that, under our former rule, the requirement to collect race, ethnicity, and gender data was construed as preempting state laws that restricted the collection of such data. However, NAB is concerned that because Option B is not mandatory in that a broadcaster could choose Option A, which does not involve the collection of race, ethnicity, and gender data, a state could argue that the collection of such data is not required by our EEO Rule.

52. We will grant the requested clarification. Our intent in adopting the EEO Rule is that broadcasters (and cable entities) should have the discretion to elect either Option A or Option B. A state law that was interpreted as removing that discretion would be inconsistent with our EEO Rule.

53. We considered this issue in connection with our former rule in *NAB Request for Clarification*, 4 FCC Rcd 1715 (1989). We found therein that state laws restricting the collection of race, ethnicity, and gender data typically excluded collection required by Federal law or in furtherance of an EEO

[48] We have also received inquiries as to whether a broadcaster may utilize the services of an outside organization or individual to assist it in designing and implementing its recruitment efforts. Nothing in our Rule presently prohibits the use of an outside organization or individual to assist a broadcaster in its EEO compliance efforts. Thus, we intend to afford broadcasters flexibility in designing recruitment techniques that will result in broad outreach. For instance, an outside service might assist the broadcaster in identifying productive recruitment sources, facilitating the delivery of vacancy notifications to such sources, and/or preparing reports to better enable the broadcaster to track and monitor the results of its recruitment efforts. However, regardless of the method employed, each broadcaster remains individually responsible for compliance with the recruitment, recordkeeping and reporting requirements of our Rule.

program. NAB has not demonstrated that any state has enacted a requirement that is inconsistent with Option B. Accordingly, we find it premature to declare any particular state statute to be preempted. However, we will consider the situation should it arise.

M. Joint Recruitment Efforts

54. NAB requests clarification as to the extent to which broadcasters may perform the menu options required by Option A jointly. Specifically, it asks whether broadcasters can jointly sponsor a job fair pursuant to Section 73.2080(c)(2)(ii). It further asks whether each individual employment unit of a corporate licensee that maintains a corporate scholarship program can claim credit for the scholarship program pursuant to Section 73.2080(c)(2)(vii). It finally asks whether each individual employment unit can claim credit for a mentoring or training program sponsored by a corporate licensee that is open to all employees but only takes place at certain stations.

55. In the *Report and Order*, we indicated that we would not specify in detail the steps to be taken to implement the Option A menu options in order to accord broadcasters maximum flexibility and opportunity to experiment. We also indicated that broadcasters could implement menu options on a joint basis so long as each broadcaster remained responsible for the menu options it selected.[49] Consistent with these principles, we offer the following guidance concerning the situations raised by NAB as well as other situations that have been brought to our attention.

56. With respect to the hosting of job fairs, this option could be performed on a joint basis, subject to the qualification that each broadcaster must participate in a meaningful way in the planning and implementation of the event. It is not sufficient to merely lend the station's name to an event or support it with a financial contribution. Insofar as a particular broadcaster's participation amounts to little more than attendance at the job fair, then it can only claim credit for such attendance, even if it has been nominally designated a cosponsor.

57. We note that the term "sponsor" as used in connection with several options set forth in Section 73.2080(c)(2) has apparently been misunderstood by some as referring only to a financial contribution. Our intent for the purpose of these options is that a "sponsor" should have a meaningful input into the planning and implementation of a specified event. Simply lending one's name or making a monetary contribution would not be sufficient. Events can be jointly sponsored, so long as each broadcaster seeking credit for sponsoring the event is actively involved in planning and implementing the event. For instance, several stations might cosponsor an informational event in the community pursuant to Section 73.2080(c)(2)(xi). If the event seeks to integrate the perspective of each participating broadcaster, it could well be more valuable than an event presenting only the perspective of one broadcaster. However, a broadcaster could not claim credit for sponsorship by merely lending its name or providing a financial contribution to the event.

58. With respect to the maintenance of a scholarship program by a corporate licensee, we believe that it is reasonable for a corporate licensee to maintain a scholarship program for those employment units it owns. However, any such scholarship program should incorporate involvement by the employment units for which credit will be claimed in such areas as the design of the program, the solicitation of prospective scholarship recipients, the interviewing and selection of scholarship recipients, on-air promotion of the program, and evaluation of the effectiveness of the program. While each employment unit need not be involved in every aspect of the program, meaningful involvement in the

[49] *Report and Order*, para. 103, 15 FCC Rcd at 2374.

program is essential to ensure that the employment unit is fulfilling its responsibility under our Rule. In addition, the number of employment units seeking credit for a scholarship program should bear a reasonable relationship to the number or type of scholarships awarded by the corporate licensee.

59. We note that unrelated broadcasters could also jointly maintain a scholarship program, which could be done through a state or local broadcast association, including efforts by such associations to coordinate regional efforts. Again, however, we believe that the program should incorporate meaningful involvement by each broadcaster seeking credit for the initiative in such areas as the design of the program, the solicitation of prospective scholarship recipients, the interviewing and selection of scholarship recipients, on-air promotion of the program, and evaluation of the effectiveness of the program. Thus, a scholarship program entails more than merely providing funds. While we permit broadcasters to share the burdens involved in implementing a meaningful program, we expect some degree of participation from each participant. Also, each broadcaster participating in a joint scholarship program remains responsible for the success of the program. For instance, if a scholarship program were established and funded but no scholarships were actually awarded because no efforts were made to publicize its availability, the qualifications required of a recipient were unreasonably high, or as a result of some other factor regarding the design and/or implementation of the program, we would not consider that the initiative had been successfully implemented, and none of the participants in the joint program could claim credit for it. Finally, as in the case of corporate scholarship programs, the number or type of scholarships awarded by the joint scholarship program would have to bear a reasonable relationship to the number of employment units seeking credit for it.

60. With respect to mentoring, internship or training programs administered by a corporate licensee, employment units of the licensee could claim credit for such a program even if not implemented in the community where the employment unit is located, but only so long as personnel from the employment units are participants in the mentoring, internship or training program. Similar questions have arisen as to job fairs hosted by a corporate licensee. We would credit individual employment units with cohosting the job fair only to the extent that personnel from the unit were involved in planning and implementing the job fair. Employment units of the licensee could be credited with attendance at the job fair, but only if personnel from the employment unit with substantial responsibility in making hiring decisions at the unit in fact participated in the job fair. Put otherwise, while the corporate headquarters can assist in the implementation of menu options, personnel from the respective employment units must also be involved in implementation should they seek credit for participation.

N. Recruitment Exemptions

61. The EEO Rule requires that broadcasters recruit for every vacancy. We nonetheless recognized that, in rare instances, circumstances might arise where recruitment would not be feasible. We cited as an example the need to immediately replace an employee who departs without notice and whose duties could not be fulfilled, even briefly, by other station employees. We nonetheless noted that we could not anticipate every circumstance which might justify filling a vacancy without recruitment. We indicated that we would rely upon the good faith discretion of licensees in this respect. We made clear, however, that we expected such situations to be rare and that licensees should elect to proceed without recruitment only in exceptional circumstances.[50]

62. NAB urges that we should also recognize exemptions to the recruitment requirement in two circumstances: 1) the hiring of special talent, and 2) the hiring of a replacement for an existing employee

[50] *Report and Order*, para. 89, 15 FCC Rcd at 2369.

whom management has not yet informed of his imminent replacement. In each instance, the proposed exemption would be subject to the qualification that it not be routinely used. MMTC opposes the special talent exemption as potentially discriminatory and the exemptions for hires to replace an existing employee as unnecessary.

63. We will not create any categorical exemptions to the general requirement that broadcasters recruit for every vacancy. We recognized in the *Report and Order* that there may be exigent circumstances where recruitment might not be feasible. However, it was not our intent to create categorical exemptions to the general requirement. The hypothetical mentioned in the *Report and Order* was intended only as an example and not as an exemption routinely applicable to a particular category of hires. Either of the circumstances cited by NAB might, in some instances, justify a decision not to recruit. Nonetheless, we are unwilling to exempt these situations categorically from the recruitment requirement because it may well be entirely feasible to recruit in some of these situations, such as the hiring of "special talent." We will rather consider any claims of exigent circumstances on a case-by-case basis in light of the broadcaster's overall recruitment efforts in the event a question arises.

O. Mid-Term Review

64. Section 73.2080(f) states that the Commission intends to conduct mid-term reviews of "each broadcast television station and each radio station that is part of an employment unit of more than ten full-time employees . . . . " Fleischman asks whether this language is inconsistent with language in the *Report and Order* indicating that only radio stations, but not television stations, with five to ten full-time employees would be exempt from the mid-term review requirement.[51] There is no inconsistency. The language in the Rule concerning employment units of more than ten full-time employees refers only to radio stations, not to television stations. As indicated in the *Report and Order*, we do not believe we can extend this relief to television stations with five to ten full-time employees in light of Section 334 of the Communications Act.

P. Applicants

65. We have received inquiries concerning the definition of an "applicant" under Option B, which we will address on our own motion. The concern has been expressed that, especially as a result of internet recruitment, broadcasters may frequently receive a large number of expressions of interest and that it would be burdensome to track the recruitment source, gender, and racial/ethnic status of all such persons, if they are considered to be "applicants." We will afford broadcasters good faith discretion in defining the term "applicant." For example, a broadcaster could reasonably define an "applicant" to include only those persons who demonstrate in their application or resume that they possess the minimum qualifications for the position as specified in the vacancy announcement. However, a broadcaster should utilize a definition that is based on objective criteria, and, having decided upon a definition, a broadcaster should apply it in a consistent manner to all its positions. We also do not expect broadcasters to track the recruitment source, gender, and racial/ethnic status of non-vacancy specific expressions of interest in employment, unless such persons are thereafter considered for employment as part of a particular applicant pool.

[51] *Report and Order*, 15 FCC Rcd at 2381 and n.195. Both radio and television stations with fewer than five full-time employees are separately exempt from the mid-term review requirement pursuant to Section 73.2080(g).

66. We have received informal feedback that Option B has been construed by some as requiring that a broadcaster utilizing Option B must be able to demonstrate the recruitment source, gender, and racial/ethnic status of 100 percent of its applicants or face a finding that it is in violation of our EEO Rule. This is incorrect. We expect broadcasters which elect Option B to exercise reasonable diligence in seeking to ascertain the recruitment source, gender, and racial/ethnic status of all applicants. However, we realize that some applicants will elect not to provide this information. We will not find broadcasters that have made reasonable good faith efforts to collect the pertinent data in violation of the EEO Rule solely because some applicants declined to provide it.

Q. Part-Time Hires

67. In paragraph 109 of the *Report and Order*, [52] we indicated that if a temporary employee was hired after recruitment, any later decision to convert the employee's status to permanent could be treated as a promotion, rather than a new hire. We have received inquiries as to whether the same policy would apply in the case of a part-time employee whom the employer subsequently wishes to convert to full-time. We have decided to treat this situation in the same manner as temporaries. Thus, if a part-time employee is initially hired after broad outreach to all segments of the community, the decision to subsequently convert him or her to full-time may be treated as a promotion. However, if the broadcaster did not engage in full recruitment at the time of the initial part-time hire, it would have to recruit before converting the employee to full-time. We note that in both cases, our policy applies only where the temporary or part-time employee is promoted to the same, or essentially the same, job on a permanent or full-time basis. Also, we note that paragraph 109 of the *Report and Order* cautions that "excessive instances of temporary hires being converted to permanent hires without a meaningful opportunity for recruited applicants to compete could result in a finding of noncompliance if the evidence suggests the practice has the effect of avoiding meaningful outside recruiting." The same caution would apply to excessive instances of part-time employees being converted to full-time employees.

R. Definition of a Market

68. There are two respects in which the extent of a broadcaster's market or community is pertinent to the EEO Rule. First, a group of commonly owned stations in the same market that share at least one employee is defined as a single employment unit for purposes of the EEO Rule. [53] Thus, a broadcaster must determine what its market is in order to determine which of its individual licenses are part of that market. Second, a broadcaster must define its community for the purpose of assessing the adequacy of its outreach.[54] We have not prescribed a particular method for defining what constitutes a market or community. Rather, we are leaving these determinations to the good faith discretion of the broadcaster. In making this market determination, however, a broadcaster should assess the technical coverage of its station(s); its marketing, promotional, and advertising practices; the pertinent market definitions adopted by public agencies or commercial services, such as Nielsen and Arbitron; and requests for notices of job vacancies from locally-based community groups.

69. In determining the market for commonly owned stations, it is often necessary to assess whether stations are part of the same market even though they are licensed to different communities. Again, we accord licensees discretion to determine in good faith which stations should properly be

[52] 15 FCC Rcd at 2375.

[53] Section 73.2080(h)(2).

[54] *Report and Order*, 15 FCC Rcd at 2377.

considered part of a particular market, utilizing criteria such as those discussed above. We also note that stations in the same market should be considered part of the same employment unit even if the licenses are held by different business entities that are commonly owned or controlled. We would view licensees as commonly owned for the purpose of the EEO Rule if 50 percent or more of the voting control of the licensees is held by the same persons or entities.

70. While we are according discretion in this respect, we expect broadcasters to be able to provide a reasonable explanation for their determinations should it become pertinent. Thus, we would become concerned if the circumstances suggest that a broadcaster is unreasonably using its market definition to claim an unwarranted exemption based on having fewer than five or eleven full-time employees. Similarly, we would become concerned if a broadcaster were unreasonably defining its community in a manner that excludes certain areas or populations that it clearly does serve.

71. We also note that, although our Rule seeks to achieve broad outreach to the community, this does not preclude the use of regional or national recruitment sources. Such sources also promote the wide dissemination of information concerning employment opportunities. We will accordingly give consideration to a broadcaster's use of such sources in assessing its EEO record.

72. Finally, we recognize that there may be some employment units that are located in markets that include stations licensed to communities in more than one state that are in different renewal groups. As a result, the date of the last renewal application filing differs for some stations in the same employment unit. We have received several inquiries concerning this circumstance because the dates for placing the EEO public file report in the public file and for filing FCC Form 397 are based on the anniversary of the filing of the last renewal application. It is not our intent that employment units comply with these requirements more than once merely because they include stations in more than one renewal group. Accordingly, we will generally expect employment units in this situation to proceed in accordance with the schedule for only one of the renewal groups included in their unit. However, there may be rare instances involving television stations where it will be necessary to request a supplemental filing in order to comply with the statutory requirement that we conduct mid-term reviews of television licensees' EEO compliance.

73. Renewal applications must still be filed separately for each station in accordance with the regular schedule for the station's renewal group. FCC Form 396, the EEO form submitted with the renewal application, requests that the licensee attach the EEO public file report that is ordinarily placed in the public file simultaneously with the filing of the renewal application. In cases where a station is part of an employment unit that is using the EEO filing schedule for another renewal group, the station should submit with its FCC Form 396 the most recent EEO public file report prepared for the employment unit.[55] If the licensee feels that the most recent EEO public file report does not accurately reflect the employment unit's EEO program as of the date of the filing of the renewal application, it should disclose any pertinent facts as part of the narrative statement also required by the FCC Form 396. Finally, FCC Form 396 is ordinarily used to indicate the licensee's election of recruitment options for the next two years. However, in the case of a renewal application filed for a station that is part of an

[55] For instance, an employment unit consisting of radio stations licensed to communities in both Kansas and Missouri might choose to utilize the dates applicable to the renewal group that includes Kansas for EEO filing purposes. The Missouri station(s) in the employment unit will still file its next renewal application on October 1, 2004, the regular filing date for Missouri radio renewals. However, because the employment unit will use the EEO filing schedule for Kansas, the Missouri renewal applicant should attach to its FCC Form 396 the EEO public file report placed in its public file on February 1, 2004, the anniversary date of the filing of Kansas renewals.

employment unit including stations from other renewal groups, the renewal application must use the recruitment option specified in accordance with the filing schedule for the renewal group that governs the employment unit.

74. Employment units consisting of stations in more than one renewal group may select the renewal group that it will utilize for the purpose of determining the filing dates for its annual public file reports and its biennial statements of compliance, in accordance with the following criteria. If the employment unit includes a television station, the dates for the television station should ordinarily govern, in order to accommodate the statutory requirement for mid-term review of television licensees' EEO compliance. Apart from this situation, the renewal group that will determine the employment unit's EEO filing schedule should be selected so as to minimize the time between the date for placing the EEO public file report in the public file and the date for the filing of renewal applications for stations located in renewal groups that have different renewal filing dates than the renewal group used to determine the employment unit's EEO filing schedule. Broadcasters needing assistance in selecting an appropriate EEO filing schedule may contact the Mass Media Bureau's EEO Staff (202-418-1450).

75. There may also be circumstances where an employment unit consists of television and radio stations that are part of the same renewal group, except that the renewal schedule for radio is one year earlier than the schedule for television.[56] In these circumstances, the filing schedule for television stations should be utilized for purposes of filing the biannual statements of compliance (FCC Form 397) for the employment unit. Because the date for placing the annual public file report in the public file is the same for both radio and television, the most recent public file report should be submitted with the renewal applications for both television and radio stations in the employment unit.[57]

S. Religious Broadcasters

76. We permit religious broadcasters to establish religious belief or affiliation as a qualification for employment by rule in the case of radio broadcasters[58] and by nonbinding policy in the case of television broadcasters.[59] As a preliminary matter, we will apply this same policy to low power television and Class A television licensees, which were not specifically mentioned in the *Report and Order*. We also indicated at paragraph 149 of the *Report and Order* that, in the case of hires that are subject to a religious qualification, we nonetheless expect broadcasters to make reasonable, good faith efforts to recruit widely among their co-religionists.[60] We did not address in the *Report and Order* how we would monitor compliance with this requirement. On our own motion, we will now clarify this matter.

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[56] For instance, in the case of the North Carolina and South Carolina renewal group, the next renewal applications for radio stations are due by August 1, 2003, whereas the next renewal applications for television stations are due by August 1, 2004.

[57] Thus, a radio station in North Carolina would submit with its renewal application the report placed in the public file on August 1, 2003, and a North Carolina television station in the same employment unit would submit the report placed in the public file on August 1, 2004.

[58] Section 73.2080(c)(1).

[59] *Report and Order*, para. 149, 15 FCC Rcd at 2389.

[60] *Id.*

77. As reflected in the Notice accompanying the Initial Election Statement, we did not require broadcasters that have applied a religious qualification to all of their employees to make an election between Option A and Option B. We nonetheless expected religious broadcasters which have applied a religious qualification to all employees to file a statement with the Initial Election Statement attesting that all of their jobs were subject to a religious qualification. In the case of broadcasters that expected to have some employees not subject to a religious qualification, we expected the broadcasters to make an election and to follow the specific recruitment requirements for those positions.

78. We also expect religious broadcasters with five or more full-time employees, including those that have applied a religious qualification to all their jobs, to file the statement of compliance (FCC Form 397) in accordance with the schedule previously discussed. They should execute the certification that they have complied with the outreach provisions of the EEO Rule. In the case of hires subject to a religious qualification, the broadcaster's certification pertains to whether or not it has made reasonable, good faith efforts to recruit for all vacancies among their co-religionists. Religious broadcasters should also either make an election governing non-religious hires during the next two years or attest that all of the hires will be subject to a religious qualification.

79. With respect to recordkeeping, not all of the recordkeeping requirements are pertinent to religious broadcasters that apply a religious qualification to all of their employees because they are not required to utilize Option A or Option B. However, we believe that records as to full-time vacancies filled, recruitment sources utilized to fill those vacancies, the date each vacancy was filled, and the recruitment source of the hiree[61] remain pertinent to monitoring whether the broadcaster made reasonable, good faith efforts to recruit among persons who meet the applicable religious qualification.

80. Similarly, with respect to the requirement that broadcasters place certain EEO information in their public file, not all of the information generally required is pertinent to hires that are subject to a religious qualification. Again, however, we believe that information concerning the full-time vacancies filled, the recruitment sources used, and the recruitment source of the hiree[62] is pertinent to the requirement that broadcasters make reasonable, good faith efforts to recruit among persons who meet the applicable religious qualification. Accordingly, religious broadcasters that apply a religious qualification, including those that apply the qualification to all of their jobs, will be expected to place this information in the public file on an annual basis with respect to those hires that are subject to the religious qualification. Also, the public file report should be attached to the mid-term statement of compliance of a broadcaster subject to mid-term review and the FCC Form 396 submitted with a broadcaster's renewal application, even in the case of broadcasters that apply a religious qualification to all their jobs. Religious broadcasters should also either make an election in the FCC Form 396 or reaffirm that all their jobs are subject to a religious qualification. FCC Form 396 also calls for a narrative statement as to how the station achieved "broad and inclusive" outreach. In the case of positions subject to a religious qualification, a religious broadcaster should submit a narrative statement describing its reasonable, good faith efforts to recruit among its co-religionists for such positions.

81. We recognize that the *Report and Order* did not fully clarify the applicability of the recordkeeping and reporting requirements to religious broadcasters, especially those that apply a religious qualification to all employees. Accordingly, we will not consider a religious broadcaster that has heretofore

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[61] Section 73.2080(c)(5)(i), (ii), and (vi).

[62] Section 73.2080(c)(6)(i), (ii), and (iii).

failed to comply with the specific recordkeeping and reporting requirements clarified herein to be in violation of the EEO Rule.

T. Owner/Employees

82. We have received inquiries as to whether individuals who have an ownership interest in a broadcast licensee and are also employees of the licensee's station should be considered employees for purposes of the EEO Rule. We believe that, where an owner has a controlling interest (50 percent or greater voting control), he or she should not be considered a station "employee" for purposes of the EEO Rule, even if he or she in fact holds a position at the station. In the case of a controlling principal, any position will generally be an incident of ownership rather than a normal employment relationship. Thus, it is unlikely that a controlling principal could in any normal sense be hired or fired. We will not extend this treatment to principals with less than a controlling interest because the circumstances pertaining to their employment at the station may vary widely and we cannot necessarily assume that their employment is primarily an incident of their ownership. Therefore owners with less than 50 percent voting control of a licensee who are in fact employed at its station should be considered station employees for the purposes of the EEO Rule.

III. CONCLUSION

83. In light of the foregoing, we will deny NAB's Petition insofar as it seeks reconsideration of the rules adopted by the *Report and Order*. However, to the extent indicated above, we will clarify our requirements as requested by NAB, Fleishman, and on our own motion.

IV. PROCEDURAL MATTERS AND ORDERING CLAUSES

84. *Final Regulatory Flexibility Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA)[63] requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities."[64] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[65] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[66] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[67]

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[63] The RFA, *see* § 5 U.S.C. S 601 et. seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[64] 5 U.S.C. § 605(b).

[65] 5 U.S.C. § 601(6).

[66] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. S § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[67] Small Business Act, § 15 U.S.C. S 632.

85. In this *Memorandum Opinion and Order*, the Commission, in addition to stating various clarifications to the Commission's rules, incorporates into the rules a policy announced in the *Report and Order* that data concerning the gender, race and ethnicity of a broadcaster's or cable entity's workforce will be used only for purposes of analyzing industry trends and reporting to Congress, and that it will not be used for the purpose of assessing any aspect of an individual broadcaster's or cable entity's compliance with our EEO rules. This rule change merely retains the status quo, and for clarity restates the existing policy in a Note to the broadcast and cable rules. Therefore, we certify that the requirements of this Memorandum Opinion and Order will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Memorandum Opinion and Order*, including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. § 801(a)(1)(A). In addition, the *Memorandum Opinion and Order* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

86. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Partial Reconsideration filed by the National Association of Broadcasters and the Petition for Expedited Clarification of the FCC's New EEO Rule filed by Fleischman and Walsh, L.L.P., ARE GRANTED, to the extent indicated herein, and ARE OTHERWISE DENIED.

87. IT IS FURTHER ORDERED that the clarifications to the Commission's EEO rules and policies set forth herein ARE ADOPTED.

88. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554, Part 0, Part 73 and Part 76 of the Commission's Rules ARE AMENDED as set forth in attached Appendix B.

89. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the rule amendments set forth in Appendix B WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register or upon receipt by Congress of a report in compliance with the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, whichever is later. The amendments involve no new or modified information collection requirements.

90. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

FCC FORM 397 INITIAL FILING DATES

RADIO STATIONS

LED: OCT. 1, 2003	LED: DEC. 1, 2003	LED: FEB. 1, 2004	LED: APR. 1, 2004
DIST. OF COLUMBIA MARYLAND VIRGINIA WEST VIRGINIA Form 397: 6-1-2001	NORTH CAROLINA SOUTH CAROLINA Form 397: 8-1-2001	FLORIDA PUERTO RICO VIRGIN ISLAND Form 397: 10-1-2001	ALABAMA GEORGIA Form 397: 12-1-2001
LED: JUNE 1, 2004	LED: AUG 1, 2004	LED: OCT 1, 2004	LED: DEC 1, 2004
ARKANSAS LOUISIANA MISSISSIPPI Form 397: 2-1-2002	INDIANA KENTUCKY TENNESSEE Form 397: 4-1-2002	MICHIGAN OHIO Form 397: 6-1-2002	ILLINOIS WISCONSIN Form 397: 8-1-2002
LED: FEB. 1, 2005	LED: APR. 1, 2005	LED: JUNE 1, 2005	LED: AUG. 1, 2005
IOWA MISSOURI Form 397: 10-1-2002	COLORADO MINNESOTA MONTANA NORTH DAKOTA SOUTH DAKOTA Form 397: 12-1-2002	KANSAS NEBRASKA OKLAHOMA Form 397: 2-1-2001	TEXAS Form 397: 4-1-2001
LED: OCT. 1, 2005	LED: DEC. 1, 2005	LED: FEB. 1, 2006	LED: APR. 1, 2006
ARIZONA IDAHO NEVADA NEW MEXICO UTAH WYOMING Form 397: 6-1-2001	CALIFORNIA Form 397: 8-1-2001	ALASKA GUAM HAWAII OREGON SAMOA WASHINGTON (state) Form 397: 10-1-2001	CONNECTICUT MAINE MASSACHUSETTS NEW HAMPSHIRE RHODE ISLAND VERMONT Form 397: 12-1-2001
LED: JUNE 1, 2006	LED: AUG. 1, 2006		
NEW JERSEY NEW YORK Form 397: 2-1-2002	DELAWARE PENNSYLVANIA Form 397: 4-1-2002		

*LED = License Expiration Date

TELEVISION STATIONS

LED: OCT. 1, 2004	LED: DEC. 1, 2004	LED: FEB. 1, 2005	LED: APR. 1, 2005
DIST. OF COLUMBIA MARYLAND VIRGINIA WEST VIRGINIA Form 397: 6-1-2000	NORTH CAROLINA SOUTH CAROLINA Form 397: 8-1-2000	FLORIDA PUERTO RICO VIRGIN ISLAND Form 397: 10-1-2000	ALABAMA GEORGIA Form 397: 12-1-2000
LED: JUNE 1, 2005	LED: AUG 1, 2005	LED: OCT 1, 2005	LED: DEC 1, 2005
ARKANSAS LOUISIANA MISSISSIPPI Form 397: 2-1-2001	INDIANA KENTUCKY TENNESSEE Form 397: 4-1-2001	MICHIGAN OHIO Form 397: 6-1-2001	ILLINOIS WISCONSIN Form 397: 8-1-2001
LED: FEB. 1, 2006	LED: APR. 1, 2006	LED: JUNE 1, 2006	LED: AUG. 1, 2006
IOWA MISSOURI Form 397: 10-1-2001	COLORADO MINNESOTA MONTANA NORTH DAKOTA SOUTH DAKOTA Form 397: 12-1-2001	KANSAS NEBRASKA OKLAHOMA Form 397: 2-1-2002	TEXAS Form 397: 4-1-2002
LED: OCT. 1, 2006	LED: DEC. 1, 2006	LED: FEB. 1, 2007	LED: APR. 1, 2007
ARIZONA IDAHO NEVADA NEW MEXICO UTAH WYOMING Form 397: 6-1-2002	CALIFORNIA Form 397: 8-1-2002	ALASKA GUAM HAWAII OREGON SAMOA WASHINGTON (state) Form 397: 10-1-2002	CONNECTICUT MAINE MASSACHUSETTS NEW HAMPSHIRE RHODE ISLAND VERMONT Form 397: 12-1-2002
LED: JUNE 1, 2007	LED: AUG. 1, 2007		
NEW JERSEY NEW YORK Form 397: 2-1-2001	DELAWARE PENNSYLVANIA Form 397: 4-1-2001		

*LED = License Expiration Date

APPENDIX B

1. Part 73 of Chapter 1 of the Code of Federal Regulations is amended as follows:

Subpart H – Rules Applicable to All Broadcast Stations

Section 73.3612 is amended to add the following Note:

Note: Data concerning the gender, race and ethnicity of a broadcast station's workforce collected in the annual employment report will be used only for purposes of analyzing industry trends and making reports to Congress. Such data will not be used for the purpose of assessing any aspect of an individual broadcast licensee's compliance with the equal employment opportunity requirements of § 73.2080.

2. Part 76 of Chapter 1 of the Code of Federal Regulations is amended as follows:

Section 76.77 is amended to add the following Note to subsection (a):

Note: Data concerning the gender, race and ethnicity of a cable entity's workforce collected in the annual employment report will be used only for purposes of analyzing industry trends and making reports to Congress. Such data will not be used for the purpose of assessing any aspect of an individual cable entity's compliance with the equal employment opportunity requirements of §§ 76.73 and 76.75.

STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

Re: In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, MM Dockets Nos. 98-204, 96-16, Order on Reconsideration

I do not usually respond to separate statements of other commissioners. This is useful in producing Commission orders in reasonably prompt fashion. However, this practice has the effect of permitting the last commissioner that circulates a separate statement to have the last word. Moreover, since the date on which separate statements are circulated is not usually disclosed, it may appear to readers that a dialogue occurred and that the last commissioner to file made points that could not be rebutted, rather than that no one responded to that commissioner's statement simply because it was circulated very shortly before an order was issued. I depart from the usual practice here because Commissioner Furchtgott-Roth has issued a separate statement in the EEO reconsideration proceeding ("Reconsideration Dissenting Statement") that contains a number of erroneous statements, and a brief response is needed to set the record straight.

First, the Reconsideration Dissenting Statement contends that, "Taken as a whole, the Order evinces the Commission's purpose of achieving a broadcast workforce with a particular (albeit as yet undisclosed) racial and gender composition." Lest the public take the Commission's silence in response as an admission of the ulterior motive suggested by the dissent, let me state again what the Commission's goal is, although that goal is abundantly clear from the Commission's orders: The Commission's goal is equal employment opportunity throughout the recruitment and hiring process, without regard to race or gender.[1] No more and no less.

The dissent further contends that, if the Commission's true goal were simply broad outreach, and the EEO rule does not in fact *presume* certain levels of minority and women applicants, then information concerning whether there are minorities and women in an employer's applicant pools is *irrelevant.* This is a *non sequitur*. While an employer may conscientiously advertise its job openings, it may not know for sure whether its outreach efforts are reaching all sectors of its community based solely on where it chose to advertise. It might, for example, advertise in a newspaper but find that few or no Hispanics apply, despite a large Hispanic community. In that event, the broadcaster

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[1] As the Commission said in the Order issuing our revised EEO rules: "Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruiting and hiring process." *Report & Order* ¶ 3. Contrary to the assertions of the dissent, our EEO Rule is not premised on race and gender classifications. For example, it does not, as the dissent maintains, *require* broadcasters to sponsor job fairs with (or otherwise target) groups that have a "substantial participation of women and minorities." The EEO rule simply allows broadcasters who co-sponsor job fairs with such organizations to count that outreach effort toward their ultimate obligation to reach out to all segments of their community. Moreover, the Rule does not penalize broadcasters who choose not to partner with such organizations or who choose not to co-sponsor job fairs at all. The fundamental disconnect between the dissent and the majority is that the dissent would promote equal employment opportunity by excluding sources likely to refer minority and female applicants.

should examine its outreach methods and determine whether it might be able to disseminate the information more widely by using additional methods of distributing the information. The dissent continues to assert, but has never satisfactorily explained, how collecting this information will have the "effect of pressuring broadcasters to make employment-related decisions on the legally impermissible bases of race and gender." It is that "pressure," not the rule's race-neutrality, that is fictional. The fact is, since the Commission will never consider, in enforcing the EEO rules, the race or gender of the persons whom the employer hires (which assurance has now been codified in the rules), the rules will not have the effect advanced by the dissent. They will have only their intended effect of fostering broad outreach and equal employment opportunity.

Second, the Reconsideration Dissenting Statement states that "the Commission in its appellate advocacy has taken troubling liberties in its characterization of my views." Specifically, the Statement complains that "Contrary to the contention of the Brief, my dissent made no attempt to identify either of the two goals [of the EEO rules] as primary." I disagree.

In his February 2, 2000, statement dissenting from the *Report & Order* establishing the revised EEO rules ("February 2 Statement") Commissioner Furchtgott-Roth noted that our EEO rules initially were premised on "furthering the national policy against employment discrimination" and, only later, "the Commission stated that the regulations were meant to create diversity of programming." The February 2 Statement further noted that the Order establishing the revised rules "takes the opposite tack, *deliberately downplaying the diversity of programming rationale*." (emphasis added).

In our brief, we pointed out that, unlike the broadcast petitioners, the dissent "recognized that in the Order at issue the Commission made clear that fostering diversity of programming provided an independent and secondary basis for the EEO rules." I do not understand how the dissent can complain that our brief "has taken troubling liberties in its characterization of [his] views," when he stated that the rationales were articulated sequentially and independently and asserted that the Commission "deliberately downplay[ed] the diversity of programming rationale" in its Reconsideration Order. It seems entirely fair to characterize a rationale that has been "downplayed" as a secondary rationale.[2]

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[2] In this regard, our *Report & Order* promulgating the revised EEO rules discussed programming diversity in a separate section that followed our discussion of section 634, section 334, congressional ratification, and section 309(j), and our section addressing programming diversity began and ended with sentences stating that it provided an "additional" basis for the rules. So programming diversity was plainly an independent and secondary basis for the rules. In addition, rather than reflecting some malevolent "downplaying," our emphasis on the statutory bases for the EEO rules reflected our thorough reanalysis of our authority, coupled with our decision not to institute rules specifically designed to foster programming diversity. A good case can be made that, in addition to the EEO requirements that apply to all employees of broadcast stations, including unskilled laborers and semi-skilled operatives, special requirements should govern the recruiting and hiring of personnel such as general managers and professionals who plainly influence programming. Such special requirements for top-level employees would have to be based primarily on a programming diversity rationale, but we did not adopt any such requirements at this time. Accordingly, there was no reason to give primary weight to that rationale in the *Report & Order* issuing the revised EEO rules.

The important point is that the dissent was right the first time, although the characterization—"deliberately downplaying"—again suggests some non-existent ulterior motive.[3] After the D.C. Circuit's decision in *Lutheran Church*, the Commission took a completely fresh look at our EEO rules. That review made clear to us that Congress intended that we apply recruitment and non-discrimination requirements to *all* job categories in order to deter discrimination, even if some of those jobs have no impact on program diversity. *Report and Order* ¶ 11. Congress in 1984 and again in 1992 extended and codified our EEO rules by adopting sections 334 and 634 of the Communications Act, so that EEO requirements now apply by statute to operators of cable systems, direct broadcast satellite systems, and other multichannel multipoint distribution systems, as well as to broadcasters. *See* 47 U.S.C. §§ 334, 554.

In enacting those statutes, Congress made clear that it was not merely requiring non-discrimination from these employers—as is required of all employers by Title VII—but also was requiring them to "adopt positive recruitment, training, job design, and other measures needed to ensure genuine equality of opportunity." 47 U.S.C. § 554(c)(5); *see also* 47 U.S.C. § 334(a)(1), *codifying* 47 C.F.R. 73.2080(b) (1992 version, which also mandated "positive measures") (emphasis added). In addition, Congress was not interested only in fostering programming diversity, for it made clear that the EEO rules extended to categories of employees who do not affect the content of programming, including "unskilled laborers" and "semi-skilled operatives." 47 U.S.C. § 554(d)(3)(A). In other words, Congress required EEO programs of the sort we have reinstated. Commissioner Furchtgott-Roth would effectively nullify these Acts of Congress, which contradict his hostility to EEO programs.

Underlying Congress's decision to require "positive recruitment" measures from broadcasters and other video programming distributors, in addition to the general non-discrimination requirement imposed on all employers by Title VII, is their special use of the public airwaves. With respect to broadcasters, that basis is well-established, and its history is worth repeating briefly here. In 1966, the D.C. Circuit held that a broadcaster is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 1003. As explained in the *Report & Order* establishing the revised EEO rules, we cited both "the national policy against discrimination" and "the fact that broadcasters are licensed under the Communications Act to operate in the public interest" in the course of adopting rules "prohibiting broadcast stations from discriminating" and "requiring stations to maintain a program designed to assure equal opportunity in every aspect of station employment." *Report & Order* ¶ 23. The Supreme Court has endorsed the conclusion that broadcasters

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[3] The dissent also complains that, "contrary to the Commission Brief's representation, my dissent never validated the assumption that discrimination properly includes word-of-mouth recruiting." I find this complaint particularly curious because the paragraph that referenced Commissioner Furchgott-Roth identified him as "the dissenting Commissioner," making clear that he did not "validate" the Order in any respect. The Commission's brief only maintained that the dissent understood the Commission's Order, while the broadcasters had not; it did not contend that the dissent agreed.

are public trustees "burdened by enforceable public obligations," *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981), and the D.C. Circuit has relied upon the public trustee concept as recently as this summer. *See Community Television, Inc. v. FCC*, 216 F.3d 1133, 1146 (D.C. Cir. 2000)(referring to "the valuable public resource that is broadcast spectrum" in the course of upholding the digital television rules).

Frankly, one of the few remaining public interest obligations imposed on broadcasters is the requirement that they establish and maintain EEO programs. Congress has endorsed and expanded the reach of our EEO rules, and nothing in the D.C. Circuit's decision in *Lutheran Church* suggested that any constitutional question was raised by a race-neutral outreach obligation.

In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, MM Dockets Nos. 98-204, 96-16, Memorandum Opinion and Order

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth

I dissented from the Report & Order in this proceeding on the grounds that the new Equal Employment Opportunity ("EEO") rules adopted in the wake of *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (1998), *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494, suffer from essentially the same constitutional and statutory flaws as the original set.

Specifically, I argued that, although the outreach rule itself is phrased in race- and gender-neutral terms, the Order's implementing rules, policies, and procedures are clearly premised on racial and gender classifications. *See* Dissenting Statement of Commissioner Harold W. Furchtgott-Roth, *In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Report & Order*, 15 FCC Rcd 2329, 2501-2509 (2000) ("Dissenting Statement"). Among other things, the Order makes plain that racially "homogenous" employees are unacceptable to the Commission, *id.* at 2504-2505, requires broadcasters to track the race and gender of employment applicants and employees, *id.* at 2502-2506, concludes that these racial and gender profiles are necessary to review individual station compliance with the rules and to assess the general effectiveness of the rules, *see id.* at 2503, 2505, and requires broadcasters to co-sponsor job fairs with groups that have a "substantial participation of women and minorities," *see id.* at 2502. Taken as a whole, the Order evinces the Commission's purpose of achieving a broadcast workforce with a particular (albeit as yet undisclosed) racial and gender composition.

Repeatedly disavowing any such purpose, as do both today's Order and the Chairman's separate statement, cannot change the reality of the race- and gender-based requirements embedded in the EEO program. Moreover, if one takes the Commission at its word that its goal is to achieve equal opportunity without regard to race and gender, the fit between that neutral end and the program's facially race- and gender-based means is exceedingly poor. To my mind, the choice of means here belies the asserted purpose.

In the original item, I also expressed the view that, depending upon the governmental interest cited by the Commission, there were additional reasons to question the validity of the rules. *See id.* at 2511-2517. To the extent that the Commission seeks to rely upon the prevention or eradication of discrimination as the underlying aim of the rules, *NAACP v. Federal Power Commission*, 425 U.S. 662 (1976), presents a serious obstacle to a finding of jurisdiction under the "public interest" provisions of Title III. *See* Dissenting Statement at 2513-2514 (setting forth holding of *NAACP v. FPC* that the public interest standard does not provide authority to promote the public's general

welfare); *see also Lutheran Church*, 141 F.3d at 354. On the other hand, if the Commission points to diversity of programming as its goal, it must face the questions whether it has adequately defined that term and whether there is sufficient record evidence to support the conclusion that race and gender correlate with identifiable types of broadcast content. *See* Dissenting Statement, 15 FCC Rcd. at 2514-2517; *see also Lutheran Church*, 141 F.3d at 354, 356. When relying on diversity, the Commission also wants for a compelling governmental interest for purposes of Equal Protection analysis. *See id.*, at 354-355 (rejecting diversity of programming as compelling government interest). As I explained, the fact that both interests suffer from legal flaws puts the Commission to a Hobson's choice in crafting and defending EEO rules. *See* Dissenting Statement, 15 FCC Rcd. at 2513, 2517.

In its filing with the D.C. Circuit in the pending appeal of these new rules, the Commission hangs its constitutional hat on the non-discrimination hook. *See* Brief for Respondents, *Maryland-District of Columbia-Delaware Broadcasters Ass'n v. FCC*, Nos. 00-1094, 00-1198, at 38-56. Although the Commission's Brief points to my dissent as proof that the rules are based solely on a theory of non-discrimination and that even I "understood that the Commission's primary basis for enacting the rules was the deterrence of discrimination, including discrimination that can occur as the result of reliance on word-of-mouth recruiting," *id.* at 39, that is simply not what my statement says.

In dissent, I noted that the original EEO rules were adopted initially on a non-discrimination basis. I went on to explain, however, that the Commission subsequently articulated another regulatory end – namely, diversity in programming. *See* Dissenting Statement, 15 FCC Rcd. at 2512 ("Originally, the EEO rules were adopted in the 'public interest' of furthering the general national policy against employment discrimination . . . . Later, the Commission stated that the regulations were meant to create diversity of programming.") (internal citations omitted). Counter to the contention of the Brief, my dissent made no attempt to identify either of the two goals as "primary." Rather, I observed that the Commission has switched back and forth between the goals depending upon the legal problem *du jour* that it sought to avoid. *See id.* ("Since [it adopted the second goal of diversity of programming], the Commission has alternated between these goals as independent rationales or cited them as complementary aims."). [1]

[1] The fact that I further observed that the Commission continued in the February EEO Order its pattern of vacillating between goals, *i.e.*, that it "downplay[ed]" the diversity rationale, as the Chairman notes, is not to the contrary. By that statement, I meant that the Commission sought to make the diversity theory sound less important to the regulatory plan than it actually was; in other words, the Order soft pedaled, or muted, the significance of that theory. That is not the same thing as an assertion on my part that the non-discrimination theory clearly and actually took preeminence over any other aim.

Furthermore, and again contrary to the Commission Brief's representation, my dissent never validated the assumption that discrimination properly includes word-of-mouth recruiting. As a matter of simple fact, my dissent expressed no opinion on either the truth or the falsity of that proposition. If anything, I arguably cast some doubt on its legitimacy by stating that the Commission's understanding of discrimination was out of step with traditional employment discrimination law. *See id.* 2505 at n. 5 ("The breadth of this policy – which limits the ability of broadcasters to hire based on 'word of mouth,' without any evidence of past or present discrimination – is remarkable when compared to Title VII.").[2]

In view of the foregoing, I think it fair to say that the Commission in its appellate advocacy has taken troubling liberties in its characterization of my views. Most unfortunately, this is not the first time that this has occurred. *Cf. Lutheran Church*, 154 F.3d at 489 n. 1 ("The Commission's attempt to characterize Commissioner Furchtgott-Roth's concern as limited to television stations is disingenuous."). While I deeply regret the existence of the need to do so, I feel compelled to correct the record, lest anyone assume that I concur in the Brief's description of my position in this very important proceeding.[3]

In addition, I again emphasize the strained nature of the Commission's continuing effort to cast the new EEO scheme as race- and gender-neutral while it simultaneously enacts race- and gender-based requirements, such as the filing of race and gender information about applicants and employees. Consider the following example from this Memorandum Opinion and Order. If the outreach rule does not "require that minorities and women will in fact be present in either applicant or interview pools to any specified degree," *supra* at para. 50, then how could data documenting the race and gender of applicants logically be "necessary . . . to verify that [a] broadcaster has complied with the

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[2] The Chairman makes no answer to this aspect of my concern regarding the Brief.

[3] Notably, the Commission's ambiguity about the relationship between the purposes animating its EEO rules persists to this day. In the section of its Brief concerning statutory authority for the new rules, the Commission relies not just on the non-discrimination principle but also on the diversity rationale; it never suggests that diversity is any less significant a governmental aim than non-discrimination. *See* Brief for Respondents at 15 ("The Commission found . . . statutory support for new EEO rules in its authority to regulate broadcasting to serve the public interest and foster programming diversity."); *id.* at 29 (The Commission enforces EEO regulations "both to 'deter racial and gender discrimination' and to advance 'diversity in expression of views in the electronic media.'") (internal citations omitted). It is internally inconsistent for the Commission to disclaim the diversity rationale as merely incidental for constitutional purposes but then cite it as a fully co-equal basis for the exercise of statutory authority. Non-discrimination either was or was not the "primary," *id.* at 39, end of the EEO rules, and that answer cannot change depending on whether the Commission is making a statutory argument or a constitutional one

requirements of the recruitment [rule]," *id.* at para. 22?[4] If the rule does not presume any particular level of minorities and women in applicant pools, then information about those very levels should properly be irrelevant to the question of compliance. Other information (say, documentation of advertisements about job openings, or even a survey of all residents in the area asking whether they received notice of the openings) might be pertinent to compliance with a dissemination rule that operates without regard to race and gender, but certainly *not* information about something that the Commission purports *not* to attempt to regulate. In its effort to maintain the fiction of race- and gender-neutrality and still pursue what the Commission perceives as inadequate minority and female "represent[ation]," 15 FCC Rcd. at 2331, in broadcast employment, this Order – like the one that it affirms -- meets itself coming and going.

In response to all of this, the Chairman cites Congress' judgment that we establish and maintain EEO programs. Those statutory requirements could have been satisfied with a race- and gender-neutral outreach program, however. As to cable operators, the statute requires only "positive . . . measures needed to ensure genuine equality of opportunity," 47 U.S.C. section 554(c)(5), not necessarily the injection of race- and gender-based decisionmaking into the employment process. With respect to broadcasters, the issue is slightly more complicated, as the plain language of section 334(a)(1) appears simply to have frozen into place our (now invalidated) 1992 EEO rules. In any event, even if the relevant statutes necessitated the use of race– and gender-based classifications in EEO rules, the Commission in other contexts has prudently decided to avert Equal Protection issues by creating a broader, neutral category of beneficiaries. That approach has been upheld by the D.C. Circuit.[5] Assuming *arguendo* that EEO

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[4] The Commission's conclusion that race and gender data are not just relevant but "necessary" to its review for compliance with the outreach duty also suggests that the data collection requirement is not severable from the rest of the EEO program. It appears doubtful that the Commission would have adopted the substantive requirements of the outreach rule if it lacked the concomitant ability to evaluate and enforce compliance with those requirements. *See K-Mart Corp. v. Cartier*, 486 U.S. 281, 294 (1988). Although the Commission now asserts that it always meant its race- and gender-based requirements to be severable, *see supra* at para. 22 n. 19, it never explains how the data collection requirements could be indispensable to compliance review and still severable; the Commission cannot have this both ways.

[5] In rulemaking for spectrum auctions under section 309(j) of the Communications Act, the Commission took the sensible approach of granting a preference to small businesses in general, as opposed to minorities and women in particular, as arguably contemplated by the statute. On review of this decision, the D.C. Circuit held: "By selecting this option, the Commission avoided any issue under *Adarand*, and yet complied with the congressional directive to create opportunities for small businesses and for women- and minority-owned businesses to participate in the [telecommunications] market. . . . [T]he modified rules will incidentally benefit businesses owned by minorities and women as many such businesses will qualify as small businesses." *Omnipoint Corp v. FCC*, 78 F.3d 620, 633-634 (1996).

programs are a statutory obligation for both cable and broadcasters, there is no reason that we could not have applied that same model here.

Thus, my disagreement is not with these statutory provisions, as the Chairman suggests. It is indisputable that we are duty-bound to implement them according to their terms. As explained above, however, these statutes simply do not mandate the use of constitutionally suspect racial and gender classifications. My disagreement is with the Commission's decision to exercise its discretion under these provisions in a way that needlessly triggers grave Equal Protection problems. Given that the D.C.Circuit already has struck down one set of EEO rules as unconstitutional, the Commission's continued insistence on pushing this legal envelope seems ill-advised, to put it mildly.

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Today's Memorandum Opinion and Order does nothing to cure the above-described constitutional and statutory flaws in the new EEO rules. Rather, it simply makes a few minor modifications to a regulatory plan that, for reasons detailed in my original dissent, has the purpose and effect of pressuring broadcasters to make employment-related decisions on the legally impermissible bases of race and gender. And all of this adopted when an undoubtedly race- and gender-neutral alternative – that proposed by the Broadcast Executive Directors Association – was plainly available to the Commission. Try as the Commission might to talk its way past *Lutheran Church*, I do not think that its action allows for the avoidance of that precedent. Accordingly, I respectfully dissent from this item.